

by Section 251.¹⁷⁹ Indeed, the Commission previously has rejected such proposals in this context and it should do so again.¹⁸⁰

The Commission was very clear in the *UNE Remand Order* that triggers should not be used to supplant the required fact-based unbundling analysis: “It is not appropriate to use these types of triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter.”¹⁸¹ Notably, the Commission also found that the mere presence of one or more competitors “is not indicative of whether, without unbundled access to the incumbent LEC’s facilities, competitive LECs could provide service to other customer in the same market or to customers in other markets.”¹⁸² The Commission also flatly rejected calls to have unbundling requirements sunset as of a specified date.¹⁸³ Each of these conclusions remains valid today.

Indeed, the 1996 Act does not, in its plain language or overall intent, authorize unbundling proxies or sunsets in place of analysis. First, if Congress had intended to craft a time-limited unbundling standard, it easily could have done so. Instead, Congress adopted a standard that is limited by a measurement of impairment, among other fact-specific factors.

Second, “impairment” cannot be assessed by facts absent of analysis. Triggers tell precious little about the state of competition. As the Commission itself has recognized, the presence of a competitor or a collocation – or several – reveals nothing about whether carriers

¹⁷⁹ Section 251 requires the Commission to undergo a “rational” analysis of unbundling, and not “blind itself” to the state of competition and the local network. *Iowa Utils. Bd.*, 525 U.S. at 389-390.

¹⁸⁰ *E.g.*, *Local Competition First Report and Order*, 11 FCC Rcd. at 14626, ¶ 247.

¹⁸¹ *UNE Remand Order*, 15 FCC Rcd. at 3756, ¶ 132.

¹⁸² *Id.*, 14 FCC Rcd. at 3757, ¶ 132; *see also id.*, 14 FCC Rcd. at 3810, ¶ 256 (“The fact that a single carrier is collocated in a particular central office and is not using unbundled switching does not conclusively demonstrate that a variety of carriers can self-provision switches[.]”).

are impaired without access to certain network elements. For example, although the ILECs love to count (and over-count) collocations, their tallies ignore the point that the majority of those collocations are for the purpose of accessing UNEs.

In sum, displacing the statutorily mandated impairment analysis with an analysis-free trigger or fact-free sunset standard would be inherently arbitrary and capricious and would require a strong agency showing of reasoned market analysis to survive potential judicial challenge.¹⁸⁴ The Commission's prior decisions rejecting triggers and sunsets remain sound, and no development over the past two years supports their displacement.

E. The States Should Play an Active Role in Determining Which Elements Must Be Unbundled

The Commission again seeks comment on the proper role of the states with respect to the implementation of unbundling requirements under Section 251.¹⁸⁵ This issue, twice decided by the Commission in prior orders,¹⁸⁶ should be decided in a manner consistent with the Act and existing Commission policy. That is, the state commissions, in accordance with Section 251(d)(3) of the 1996 Act,¹⁸⁷ may add to the national UNE list set by the Commission but may not detract from that list on an individual basis.¹⁸⁸

¹⁸³ *UNE Remand Order*, 15 FCC Rcd. at 3766, ¶ 52 ("We decline to adopt a rule mandating that elements will not be subject to unbundling after a date certain in the future.").

¹⁸⁴ *See, e.g., United States Tel. Ass'n v. FCC*, 188 F.3d 521, 530 (D.C. Cir. 1999) (upholding FCC application of the X-factor of incumbent productivity for one year as a rational continuation of past reasonable agency policy); *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1074-75 (D.C. Cir. 1997) (permitting the Commission to set time-limited access charge rates as a reasonable interpretation of the 1996 Act).

¹⁸⁵ *NPRM*, ¶ 75.

¹⁸⁶ *UNE Remand Order*, 15 FCC Rcd. at 3762, ¶ 144; *Local Competition First Report & Order*, 11 FCC Rcd. at 14627, ¶ 248.

¹⁸⁷ Section 251 provides that "the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3).

... Continued

In its *UNE Remand Order*, the Commission determined that the “legislative history indicates that Congress expected that the Commission would identify a national list of network elements” and that doing so would serve several goals of the Act, including the rapid introduction of competition, certainty in the marketplace, administrative practicality, and the promotion of facilities-based competition.¹⁸⁹ Accordingly, the Commission adopted a national list and indicated that it would “apply discrete geographic and product market exceptions to the incumbent’s duty to unbundle the elements on the national list, where appropriate.”¹⁹⁰ As it had done in its initial *Local Competition Order*, the Commission declined to permit states to remove elements from the national UNE list. In this regard, the Commission concluded that “state-by-state removal of elements from the national list would ‘substantially prevent implementation of the requirements of Section 251’ as prohibited by subsection 251(d)(3)(C);”¹⁹¹ it further stated that such piecemeal action “would not be consistent with the goals of the 1996 Act.”¹⁹² These legal conclusions remain sound today.

The Commission also cited numerous policy reasons for not removing elements from the national UNE list on a state-by-state basis – chief among them being the reasons cited above for implementing a national list in the first place and the need to provide “enough certainty to allow

Section 261 of the 1996 Act also provides that a state may “impose requirements . . . that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.” 47 U.S.C. § 261(c). It is axiomatic that removal of an existing federal UNE would be “inconsistent” with the FCC’s regulations.

¹⁸⁸ *UNE Remand Order*, 15 FCC Rcd. at 3763-3765, ¶¶ 147-148.

¹⁸⁹ *Id.* at 3752-3765, ¶¶ 120-148.

¹⁹⁰ *Id.* at 3752, ¶ 120.

¹⁹¹ *Id.* at 3768, ¶ 157; *see also id.* at 3767, ¶ 154.

¹⁹² *Id.* at 3768, ¶ 157; *see also Local Competition First Report & Order*, 11 FCC Rcd. at 14624 ¶ 242.

competitive LECs to develop and implement regional and national business plans.”¹⁹³ In this regard, the Commission wisely observed that “certainty and predictability” are necessary to enable competitors to raise capital needed to create and enhance networks.¹⁹⁴ The Commission also determined that state-by-state removal of UNEs from the national list “would complicate negotiation of interconnection agreements and would most likely lead to increased litigation,” as ILEC challenges to unbundling rules would likely outstretch the resources of state commissions and competitors alike.¹⁹⁵ Nothing has transpired in the past two years that suggests different conclusions would be appropriate.

Notwithstanding their inability to remove elements from the national UNE list, state commissions have since 1996 retained the authority to *add* unbundling requirements as they deem necessary to facilitate the development of competition in their respective states.¹⁹⁶ The CLEC Coalition strongly supports the right of state commissions to participate in the Section 251 process and establish additional procompetitive unbundling requirements within their states. The states’ work in this regard has been instrumental in accelerating the pace and widening the breadth of competition in a number states. For example, Georgia has required unrestricted access to EELs and has adopted reasonable provisioning intervals to ensure that access is provided in a meaningful way. This rule has allowed several Coalition members to expand the

¹⁹³ *UNE Remand Order*, 15 FCC Rcd. at 3769, ¶ 159.

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*, 14 FCC Rcd. at 3769-70, ¶¶ 160-61.

¹⁹⁶ *UNE Remand Order*, 15 FCC Rcd. at 3767, ¶ 154; *Local Competition First Report & Order*, 11 FCC Rcd. at 14624-25, ¶ 243.

reach of their networks and integrated voice and broadband service offerings in a cost-effective manner. Five other states in the southeast have followed Georgia's lead.¹⁹⁷

In light of the "more granular" unbundling analysis contemplated by the Commission,¹⁹⁸ a broader role for the states seems advisable. For example, the states should have a significant role in determining geographic exceptions to the Commission's national unbundling rules. State commission processes (hearings, as opposed to notice and comment rule makings followed by resource intensive ex parte lobbying), expertise regarding consumer concerns, and proximity to geographic markets for which exceptions may be considered likely make them better suited to make geographic-specific determinations of impairment. Some state commissions, however, may not have the resources to administer such a comprehensive review and the task may nevertheless fall upon the Commission. Thus, prior to adopting any exception to its national list the Commission should request state commission review and a recommendation based on that fact finding. This, and other proposals seeking to capitalize on the states' expertise and fact finding capability regarding market conditions in geographic markets within their states, should be incorporated into any "more granular" unbundling framework the Commission decides to adopt.

¹⁹⁷

Louisiana, South Carolina, Tennessee, Kentucky, and Mississippi also require BellSouth to provide new EELs without any use or service restrictions. E.g., *Petition of Sprint Communications Company, LP for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(d) of the Telecommunications Act of 1996*, Case No. 2000-480, Order (Ky. P.S.C. June 13, 2001) (adding UNE-P and EELs to the unbundling list; *Petition by AT&T Communications of the South Central States, Inc. and TCG Ohio for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Case No. 2000-465, Order (Ky. P.S.C. May 16, 2001), *recon.* (Ky. P.S.C. June 22, 2001); *Petition of ITC^DeltaCom Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 97-374-C, Order on Arbitration at 30 (Oct. 4, 1999) (ordering BellSouth to provision all existing UNE combinations).

¹⁹⁸

See NPRM, ¶ 34.

**IV. ALL UNES ON THE NATIONAL LIST MUST BE RETAINED
AND THE EEL SHOULD BE DEFINED AS A NEW UNE**

The Commission should retain all elements presently on the UNE list. Under the Commission's settled "impair" test, each of these elements: loops, subloops, NIDs, dedicated transport, operations support systems ("OSS"), switching,¹⁹⁹ and call signaling and databases are important components of the local network that CLECs rely on to provide service. In fact, many of these elements – especially high-capacity loops and transport – are crucial to CLECs' ability to provide broadband services and give consumers a real choice for innovative services. None of these elements can be self-provisioned by CLECs without causing them severe cost, delay and operational degradation. Nor are there sufficient alternative sources for any element that can provide CLECs the quality, ubiquity or efficiency that the ILECs have enjoyed for decades. The Commission therefore should not deny or restrict access to any UNE, as CLECs today remain impaired without cost-based unbundled access to them.

**A. CLECs Would Be Impaired Without Cost-Based
Unbundled Access to Loops, Subloops and NIDs**

There are no "changed circumstances" that have developed over the past two years that would support or justify removal of loops, subloops or NIDs from the national UNE list.²⁰⁰ CLECs today, despite their progress, would still be impaired without cost-based unbundled access to the loop, subloop and NID UNEs. These elements are not reasonably replicable through self-supply, nor are substitutes available from third parties "as a practical, economic, and

¹⁹⁹ The CLEC Coalition does not provide argument as to switching but believes that this element continues to meet the "impair" test and should be unbundled.

²⁰⁰ *NPRM*, ¶ 48.

operational matter.”²⁰¹ As demonstrated in the affidavits attached hereto, these conclusions hold true across the vast expanse of geographic markets served by members of this Coalition.

1. All loops – including dark fiber – regardless of type, length, composition or capacity, must remain UNEs

The Commission asks whether loops should remain available on an unbundled basis “in light of changed circumstances.”²⁰² In short, loops must be unbundled under the “impair” standard, because CLECs would be virtually unable to provide service without them, as non-ILEC alternatives are scarce, if not altogether non-existent in most markets served by Coalition members.

The Commission initially defined the loop as “a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.”²⁰³ In the *UNE Remand Order*, it updated this definition to include “all features, functions, and capabilities of the transmission facilities” available to the ILEC between its central office (“CO”) and the customer.”²⁰⁴ The Commission also amended the definition to state that the termination point of a loop is not necessarily a NID, but where the incumbent’s ownership and control over the line ceases.²⁰⁵ Thus, in many instances, loops also include the inside wire of a premises, whether a single-family home or multi-unit dwelling.²⁰⁶

²⁰¹ *UNE Remand Order*, 15 FCC Rcd. at 3846, ¶ 333.

²⁰² *NPRM*, ¶ 48.

²⁰³ *Local Competition First Report & Order*, 11 FCC Rcd. at 14691, ¶ 380.

²⁰⁴ *UNE Remand Order*, 15 FCC Rcd. at 3772, ¶ 167.

²⁰⁵ *Id.* at 3773, ¶ 168.

²⁰⁶ *Id.* at 3774, ¶¶ 170-170.

The Commission should not adopt any proposal to change the core loop definition significantly.²⁰⁷ Rather, it should reiterate that a loop is an element that connects a distribution frame to a customer's premises for the purpose of transmitting communications. With that core definition in mind, there is one instance in which modification would be appropriate in order to ensure both clarity and meaningful competitive access to the loop.

The Commission should hold that, where a customer is served from a remote terminal ("RT") to which competitive access is limited or precluded, the loop must include the facility leading to the RT along with the distribution functionality provided in the RT and the loop that extends to the customer's premises. This facility may be termed, for ease of reference, a "loop with midloop electronics." This modification builds on the Commission's earlier determination that "the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity."²⁰⁸

The CLEC must receive the complete loop reaching the end user. Where that loop reaches an RT holding a distribution frame (be it a DSLAM or a packet switch), the CLEC must obtain the loop up to and through that frame. Without such access, the CLEC would be precluded from reaching any end user whose loop passes through an RT. The FCC has recognized this problem as a potential barrier to competition in the *UNE Remand Order* and required ILECs to provide unbundled access to "packet switching" (DSLAMs) in such cases, because "competitors are effectively precluded altogether from offering xDSL service if they do not have access to unbundled packet switching."²⁰⁹ In furtherance of that policy, the

²⁰⁷ *NPRM*, ¶ 48.

²⁰⁸ *UNE Remand Order*, 15 FCC Rcd. at 3776, ¶ 175.

²⁰⁹ *Id.* at 3838, ¶ 313.

Commission should simply define the loop as the complete transmission facility, including all midloop electronics, extending from a main distribution frame to a customer's premises.

The local loop is the *sine qua non* of local competition, and is by far the most difficult element to replicate to any meaningful degree. As the Commission's recent *Local Competition Report* demonstrates, it is an extremely lengthy process for competitors to build redundant local loops.²¹⁰ For example, the *Local Competition Report* shows that ILECs own or control 91 percent of all switched access lines on a nationwide average.²¹¹

Congress enacted Section 251 on the understanding that incumbents maintain a substantial competitive advantage in having inherited their networks.²¹² Indeed, the premise of Section 251 is that "local providers maintain bottleneck control over the essential facilities needed for the provision of local telephone service."²¹³ This bottleneck control is no more true than in the context of local loops. In fact, Congress expressly stated that "the term 'network element' was included to describe the facilities, such as local loops" that an ILEC "must provide for certain purposes under" Section 251.²¹⁴

The Commission has understood for years that the ILECs' local loop architecture cannot be replicated absent extraordinary time and expense. Accordingly, the Commission has repeatedly recognized that competitors cannot reasonably be expected to replicate local loops,²¹⁵ as such an effort "would be extremely difficult for competitive LECs ... even to serve businesses

²¹⁰ As of June 2001 – more than five years since passage of the 1996 Act – CLEC self-provisioned loops comprise only 3.0% or less of all switched lines in the United States. Common Carrier Bureau Industry Analysis Division, *Local Telephone Competition: Status as of June 30, 2001* at 1 (February 2002) ("*Local Competition Report*").

²¹¹ *Local Telephone Competition* at 1.

²¹² House Report at 49; Joint Explanatory Statement at 148.

²¹³ House Report at 49.

²¹⁴ Joint Explanatory Statement at 116.

in urban districts.”²¹⁶ A full loop “overbuild” would “embroil the competitor in lengthy rights-of-way disputes, and would require the unnecessary digging up of streets.”²¹⁷ Even were such a project technically and politically feasible, it is “prohibitively expensive and time-consuming.”²¹⁸ Even in a best-case scenario, the competitor would incur an enormous up-front capital expenditure and be delayed years in reaching customers.

The problems identified by the Commission with respect to loop architecture are present in both the self-provisioning and the third-party vendor context, and they persist to this day. As a practical matter, building loop plant continues to be, in most cases, prohibitively expensive and time consuming.²¹⁹ Obtaining rights-of-way and permitting remain substantial barriers to the deployment of non-ILEC loop alternatives.²²⁰ Competitors thus remain unable to replicate the advantages of size and scope inherent in ILEC networks.²²¹ It remains unreasonable to expect a CLEC to invest large sums of capital (or for Wall Street to invest such sums) to build loop plant (ubiquitous or even quite limited) before the CLEC has secured a substantial and secure

²¹⁵ *UNE Remand Order*, 15 FCC Rcd. at 3779, ¶ 183.

²¹⁶ *Id.*, 14 FCC Rcd. at 3780, ¶ 185.

²¹⁷ *UNE Remand Order*, 15 FCC Rcd. at 3781, ¶ 186. The right-of-way issue has proved a significant obstacle to competitive deployment, causing the Commission to devote its rulemaking authority to its resolution. *See Third Advanced Services Report*, ¶ 166 & n. 375.

²¹⁸ *UNE Remand Order*, 15 FCC Rcd. at 3780, ¶ 183.

²¹⁹ TDS reports that “it can cost up to \$20-\$30 per foot and up to \$150,000 per mile to lay fiber” in addition to “right of way agreements which can be as high as \$10,000 and ongoing right of way fees that in some cases have been as high as \$0.20-\$0.30 per foot, per year.” Jackson Aff., ¶ 11 (TDS). KMC also reports extremely high costs of self-provisioning high-capacity loops. Duke Aff., ¶ 8 (KMC) (figures available in proprietary version).

²²⁰ SNIp LiNK explains that in New Jersey, there are no rules governing rights-of-way, and “Verizon has blanket authority to use rights-of-way and pole attachments for building its local network without applying to the local municipalities for permission, without paying a fee, and without rules from the [New Jersey Board of Public Utilities].” Polito Aff., ¶ 4 (SNIp LiNK).

²²¹ Duke Aff., ¶ 11 (KMC); Jackson Aff., ¶ 10 (TDS).

customer base²²² and especially in light of the fact that redundant CLEC facilities likely would be stranded if the customer was lured back to the ILEC via an aggressive winback promotion.²²³ Most significantly, the capital needed to fund the development of non-ILEC UNE loop alternatives has all but dried up over the past two years for many CLECs and is severely limited for most others.

For these reasons, redundant local loop architecture upon which competitors may rely to reach customers remains scarce, today. Indeed, in many, if not most instances, ILECs remain the sole source for local loops.²²⁴ As TDS states, “ILEC loops continue to be the only available link to the vast majority of current and prospective customers.”²²⁵ Thus, loops continue to satisfy the Commission’s “impair” test for unbundling.²²⁶ The Commission should therefore hold that all loops, including 2- and 4-wire analog voice-grade loops, digital loops, xDSL-capable and ISDN loops, and all “high capacity” loops (DS1 level and higher), including all inside wiring, must remain available on an unbundled basis.

²²² Mike Duke explains in his affidavit that KMC has self-provisioned loops on the condition that “[its] customer base can support the additional expenditures.” Duke Aff., ¶ 9 (KMC).

²²³ BellSouth, for example, has a well-developed “WinBack” campaign that has generated considerable controversy.

²²⁴ Duke Aff., ¶ 11 (KMC) (“KMC has still not found any third party that can provide it with alternatives to ILEC loops to fit its proposed service plan.”); Cadieux Aff., ¶ 8 (NuVox) (“[G]enerally NuVox is not aware of third-party providers actively offering HiCap loop facilities on an unbundled, wholesale, basis”). See also, e.g., Association for Local Telecommunications Services Petition for Declaratory Ruling: Broadband Loop Provisioning, CC Docket No. 98-147, at 7 (May 17, 2000) (“ALTS Petition”); see also CC Docket No. 96-98, CLEC Coalition Joint Comments at 22-23 (June 11, 2001) (opposing the Joint Petition of SBC, BellSouth and Verizon for relief from loop unbundling rules) (“CLEC Coalition High-Cap Loop Comments”). For example, Cbeyond has explained to the Commission that “as a practical matter, Cbeyond does not have any alternative to BellSouth for high-capacity loops.” *Id.* at 23.

²²⁵ Jackson Aff., ¶ 10.

²²⁶ The proper test for evaluating the loop as a UNE is the “impair standard.” The Commission has never found that ILECs have a proprietary interest in local loops. *UNE Remand Order*, 15 FCC Rcd. at 3772, ¶ 165. Therefore, where the Commission finds that a competitor would be impaired in providing its chosen service if denied access to loops, taking into account the five relevant factors adopted in 1998, incumbents must make loops available on an unbundled basis.

**a. High capacity loops are essential to
delivering broadband services**

CLECs would be no less impaired without access to high-capacity loops than they would be with respect to other loops. The Commission has twice specifically held that high capacity loops must be unbundled.²²⁷ Perhaps more importantly, it held that high-capacity loops are simply considered loops for purposes of unbundling because “they retain the essential characteristic of the loop.”²²⁸ The Commission rejected ILEC attempts to segregate high-capacity loops from other loops, because “[a]lthough it may be more profitable to serve customers over high-capacity lines, such differences do not support a modification of the loop definition to exclude high-capacity lines.”²²⁹ In this proceeding, the Commission should retain this conclusion, rather than engaging in analysis according to “a particular level of bandwidth” associated with loops.²³⁰

High-capacity loop facilities are the key to bringing broadband services to consumers, which the Commission has stated as a foremost goal in this proceeding.²³¹ Only high-capacity loops can provide the fast, two-way access to the Internet that will support a wide variety of broadband applications. Thus, the Commission’s dedication to fostering broadband services absolutely requires that competitors retain access to the loop facilities that support them. As the CLEC Coalition has shown, this access must come from the ILECs, because neither self-provisioning nor third-party procurement can get crucial high-capacity loops in CLEC hands in a

²²⁷ *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 176; *Local Competition First Report and Order*, 11 FCC Rcd. at 15691, ¶ 380; *see also* 47 C.F.R. § 51.319(a).

²²⁸ *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 176; *see also Local Competition First Report and Order*, 11 FCC Rcd. at 15691, ¶ 380.

²²⁹ *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 176 (emphasis in original).

²³⁰ *See NPRM*, ¶ 49.

²³¹ *E.g., NPRM*, ¶ 4.

timely, efficient or non-cost-prohibitive fashion.²³² The bottom line is that CLECs are not only impaired in, but nearly precluded from, providing broadband services without access to high-capacity loops – these facilities more than meet the Commission’s settled unbundling standard.

Finally, the Commission should expressly hold that where high-capacity loops include, (or must include) electronics, those electronics are a part of the loop UNE and must be provided on an unbundled basis.²³³ This requirement should apply equally to high-capacity loops as to any other loop.²³⁴ If a high-capacity loop is presently in use and activated by or through electronics, it is non-sensical to permit the ILEC to provision it without those electronics. If the loop is not in use, but requires electronics for activation, the necessary modification ought to be made. Not only does the Commission have the authority to require complete provisioning in this manner,²³⁵ but the unbundling mandate of Section 251(c)(3) demands it.²³⁶

b. Dark fiber loops retain all loop characteristics and enable CLECs to reach new customers and provide new services

In its *UNE Remand Order*, the Commission found that “dark fiber is essential for competition in the provision of advanced services.”²³⁷ This conclusion remains no less true today than it was then. Accordingly, the Commission must continue to include dark fiber in the definition of UNE loops. As the Commission previously has found, dark fiber loops share the

²³² Cadieux Aff., ¶ 11 (NuVox is not aware of third-party providers actively offering HiCap loop facilities on an unbundled, wholesale basis.”); Jackson Aff., ¶ 10 (TDS) (ILEC loops continue to be the only available link to the vast majority of current and prospective customers.”).

²³³ See *NPRM*, ¶ 52.

²³⁴ See Section IV.A.1, *infra* (discussion of midloop electronics).

²³⁵ *NPRM*, ¶ 52.

²³⁶ ILECs are required, for example, to modify xDSL-capable loops at a CLEC’s request. *UNE Remand Order*, 15 FCC Rcd. at 3783, ¶ 191.

²³⁷ *UNE Remand Order*, 15 FCC Rcd. at 3785, ¶ 196.

characteristics of other loops in all respects, save for not being “lit” or activated by the ILEC.²³⁸

As dark fiber loops are simply loops,²³⁹ CLECs are just as impaired without dark fiber loops as they are without lit loops. All of the same impairment analysis – the prohibitive cost of building out redundant loops in every street – applies equally to dark fiber. Therefore, CLECs suffer equal impairment without dark fiber, requiring that dark fiber loops remain available on an unbundled basis.

Further, a requirement to provide unbundled access to dark fiber means little unless ILECs are required to tell CLECs where it resides and to allow CLECs an efficient means of connecting to it. The Commission has strict rules requiring ILECs to provide comprehensive copper loop make-up data to CLECs during the preordering phase. It requires ILECs to provide all loop information upon which they rely to provide retail service, as well as all information in their possession, under the nondiscrimination requirements of Section 251.²⁴⁰ This nondiscriminatory access to information requirement can and should apply to dark fiber loops, as well. Without being able to learn where dark fiber is, CLECs cannot order it, rendering the Commission’s rule an empty mandate.

Indeed, MFN’s experience has shown that, of all the ILECs, only Qwest provides access to information necessary for CLECs to determine where dark fiber loops are available.²⁴¹ Qwest’s Loop Fiber Inventory Tool (“LFIT”) database includes a list of locations where it has dark fiber loops available. The LFIT resides on Qwest’s website and identifies all fiber serving a

²³⁸ *UNE Remand Order*, 15 FCC Rcd. at 3785-3786, ¶ 198 (referencing and incorporating discussion of dark fiber transport at 14 FCC Rcd. at 3843-46, ¶¶ 325-330).

²³⁹ *Id.* at 3785, ¶ 196.

²⁴⁰ *Id.* at 3885, ¶ 427, 3886-3887, ¶ 430.

²⁴¹ Reply Comments of Metromedia Fiber Network Services, Inc., CC Docket No. 96-98, at 8 (June 25, 2001) (“MFN High-Cap Reply Comments”).

particular customer, including working fiber, restricted fiber and dark fiber.²⁴² Other ILECs, however, rely on cumbersome processes²⁴³ to subvert nondiscriminatory access to the information resident in their own systems and records and, ultimately, to deny unbundled access to dark fiber loops.²⁴⁴ The Commission should bar the imposition of these cumbersome processes, as it already has established that ILECs have an obligation to provide nondiscriminatory access to information.²⁴⁵

The Commission also must take action to ensure efficient and timely access to dark fiber loop plant. SBC repeatedly has refused to offer MFN collocation for the purpose of accessing dark fiber UNEs.²⁴⁶ This is despite the fact that MFN has already negotiated such agreements with Verizon (Bell Atlantic and GTE), Qwest and BellSouth. In refusing MFN collocation to access dark fiber UNEs, SBC has without justification insisted that MFN collocate equipment necessary to “light” the fiber in the end office.

Notably, and to its credit, Verizon has developed an offering in Massachusetts that allows efficient access to both ILEC and CLEC dark fiber without the expense of collocation. In Massachusetts, Verizon offers a cross-connect that allows MFN to access dark fiber loops and transport. In this arrangement, which is the functional equivalent of a splice, MFN pulls high-count fiber into the cable vault of the central office and terminates fibers to a fiber distribution panel. Verizon or the CLEC then can run a dark fiber cross connect to its collocated equipment or directly to UNEs. Thus, with this arrangement, MFN or another CLEC can obtain unbundled

²⁴² Riordan Aff., ¶ 15.

²⁴³ These typically involve a costly and time-consuming inquiry process that requires a CLEC to inquire whether dark fiber is available on a location-by-location basis.

²⁴⁴ MFN High-Cap Reply Comments at 8-9.

²⁴⁵ *UNE Remand Order*, 15 FCC Rcd. at 3885-3886, ¶¶ 427-428.

²⁴⁶ Riordan Aff., ¶ 13.

loops or services from Verizon and cross-connect them directly to the competitive interoffice and long haul dedicated transport.

Thus, the Commission should require ILECs to provide information about the location and type of dark fiber loops wherever possible, whether through OSS databases or paper deployment records, and prohibit onerous ILEC requirements that unnecessarily delay and increase the cost of CLEC access to dark fiber. Absent these requirements, CLECs will continue to be effectively denied access to dark fiber UNE loops.

c. UNE loop unbundling obligations should not be limited based on the presence of customer-specific ILEC loop alternatives

The Commission also should not alter its loop unbundling requirements on the grounds that “the incumbent LEC has multiple alternatives in place to serve a specific customer.”²⁴⁷ All local loops must remain unbundled, even in the rare case that the ILEC has provisioned more than one type of loop to a premises. Loop types are not uniformly substitutable, and CLECs must be able to access any one of them to suit the service that they have chosen to provide. Moreover, to deny one type of loop to a CLEC in favor of another would be discriminatory, and thus would violate Section 251,²⁴⁸ because the ILEC would never be so constrained itself. Thus, even if “multiple alternatives facilities” have been deployed to a particular premises, the Commission should not sacrifice any of those facilities as unbundled elements.

²⁴⁷ *NPRM*, ¶ 50.

²⁴⁸ ILECs must provision UNEs in a “just, reasonable and nondiscriminatory” manner. 47 U.S.C. § 251(c)(3). The Commission has held that it is discriminatory for an ILEC to deny a facility to a CLEC that it uses itself to provide service, or to provide a facility that is lesser in quality than the facility it uses. *E.g.*, *Local Competition First Report and Order*, 11 FCC Rcd. at 15658, ¶ 312.

2. Subloops satisfy the impair test and must remain UNEs

The Commission seeks comment on whether subloops continue to meet the settled “impair” test for unbundling.²⁴⁹ These facilities, as is true of loops generally, are crucial to local competition, and the failure to provide subloops would greatly impair a CLEC’s ability to provide their chosen services to end users.²⁵⁰ Two years later, there are still virtually no third-party alternatives to UNE subloops available to CLECs. Moreover, the current capital crunch and two-years’ worth of experience regarding subloop unbundling suggests that they remain extremely difficult (if not impossible) to self-provision to any degree.²⁵¹ The Commission should therefore continue to require ILECs to provide subloops on an unbundled basis.

Subloops are defined as any portion of the incumbent’s local loop plant to which a competitor can interconnect.²⁵² This term refers to any local transmission facility connecting an end user to an incumbent’s remote point of presence, for example a remote terminal (“RT”) or a controlled environment vault (“CEV”).²⁵³ The Commission has held that, consistent with the ILECs’ obligation to provide unbundled elements “at any technically feasible point,”²⁵⁴ CLECs must be able to access loops at any point “throughout the incumbent’s loop plant.”²⁵⁵

In its *UNE Remand Order*, the Commission found that competitors are impaired without access to subloops. It found that subloops are “likely to be the catalyst” that will allow

²⁴⁹ NPRM, ¶ 48.

²⁵⁰ Like all loops, subloops are non-proprietary network elements that are subject only to the “impair” standard. *UNE Remand Order*, 15 FCC Rcd. at 3790, ¶ 208; see also *Local Competition First Report and Order*, 11 FCC Rcd. at 14687, ¶ 374.

²⁵¹ Jackson Aff., ¶ 10 (TDS) (“For residential and small business customers who are served off basic loops or sub-loops, there is absolutely no way to justify overbuilding ILEC facilities using current technology.”).

²⁵² *UNE Remand Order*, 15 FCC Rcd. at 3789-3790, ¶ 206.

²⁵³ *Id.* at 3789-3790, ¶ 206.

²⁵⁴ 47 U.S.C. § 251(c)(3).

²⁵⁵ *UNE Remand Order*, 15 FCC Rcd. at 3791, ¶ 209.

competitors, over time, to deploy their own complementary subloop facilities,” and thus reduce their reliance on ILEC networks.”²⁵⁶ In fact, the Commission found that the inability to access subloops “would preclude competitors from offering some broadband services.”²⁵⁷ In addition, the Commission determined that “self-provisioning subloop elements, like the loop itself, would materially raise entry costs, delay broad-based entry, and limit the scope and quality of the competitive LEC’s service offerings.”²⁵⁸ And logic dictates that, like loops, the same difficulties are present with respect to subloops provided by third parties.

Thus, applying the Commission’s impairment standard, it cannot be open to serious question that carriers would be impaired in providing their chosen service unless they retain access to subloops on an unbundled basis.

As is the case with dark fiber UNE loops, the Commission also must adopt additional measures to ensure that its subloop unbundling requirement is effective. First, CLECs have been denied nondiscriminatory access to information about where ILEC RTs are located and as to which customers are served from those RTs. CLECs also are often hindered in accessing subloops, especially where midloop electronics and switching equipment have been deployed in an RT. The Commission should therefore continue to consider ways in which CLECs may access subloops, such as installing line cards in RT distribution frames. As ILECs continue to deploy RTs, both of these measures will be a crucial to the development of competition and to competitive facilities deployment. Absent rules to effectuate meaningful access to subloops, the

²⁵⁶ *Id.* at 3789, ¶ 205.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 3791, ¶ 209.

Commission consumers will no less “forego the benefits of competition” than if subloops were never unbundled in the first instance.

3. The end user NID is a crucial point of access that is not reasonably replicable and must remain a UNE

The Commission also asks whether network interface devices (“NIDs”) should continue to be available on an unbundled basis.²⁵⁹ As the Commission has recognized, these facilities are required in order to connect local loops to end user equipment, yet are extremely difficult to obtain or install through alternative means;²⁶⁰ the CLEC Coalition continues to require them and has no information that competitive NID providers exist. As such, they should remain UNEs subject to all Commission unbundling requirements.

NIDs are the gateway to the consumer and therefore are a key to local competition. These devices in many cases mark the termination point on the customer’s end of a local loop;²⁶¹ no carrier can serve a customer without accessing the termination point.²⁶² NIDs must be unbundled if lack of access to these elements would materially diminish a competitor’s ability to reach customers.²⁶³ Unbundled access to the NID is necessary to permit a competitor to

²⁵⁹ NPRM, ¶ 48.

²⁶⁰ *UNE Remand Order*, 15 FCC Rcd. at 3803, ¶ 239 (“[I]t is the aggregate cost and difficulty of installing duplicate NIDs at every potential customer location that substantially impairs a requesting carrier from offering service.”).

²⁶¹ The Commission recognized in the *UNE Remand Order* that the NID shall not be deemed the absolute demarcation point for a loop; rather, loop demarcation is a function of where the ILEC’s ownership or control over the loop ends. Thus, in many instances, inside wire is considered part of a loop, with the NID acting simply as an entry point to the premises. *UNE Remand Order*, 15 FCC Rcd. at 3773-3774, ¶¶ 168-169.

²⁶² *UNE Remand Order*, 15 FCC Rcd. at 3801, ¶ 233; *Local Competition First Report and Order*, 11 FCC Rcd. at 14697 ¶ 392.

²⁶³ No party has claimed, as of the release of the *UNE Remand Order*, that the NID is proprietary. *UNE Remand Order*, 15 FCC Rcd. at 3802, ¶ 236. See also *Local Competition First Report and Order*, 11 FCC Rcd. at 14697, ¶ 392.

“connect its loop to customers’ inside wiring in order to provide competing service.”²⁶⁴ For this reason, NIDs were “the only practical solution” to accessing loop termination in 1996²⁶⁵ and little has changed since then. Indeed, the Commission again found in the *UNE Remand Order* that NID construction continues to impose “significant labor and construction costs” such that market entry would be substantially delayed.²⁶⁶ Thus, “self-provisioning NIDs is not economically practical at the level of ubiquity at which incumbent LECs’ NIDs are currently deployed.”²⁶⁷

This analysis continues to apply today – regardless of whether the NID is self-provisioned or provided by a third party.²⁶⁸ The CLEC Coalition knows of no vendor that can provide it with or install NIDs at the locations they serve. Thus, they must continue to rely on ILECs for NID access in order to have an entry point to customer premises. The Commission should therefore continue to require incumbents to provide nondiscriminatory access to NIDs on an unbundled basis.

B. CLECs Would Be Impaired Without Cost-Based Unbundled Access to Transport

Unbundled interoffice transmission facilities, or transport, continue to satisfy the Commission’s Section 251 unbundling standard²⁶⁹ and should remain a UNE.²⁷⁰ The

²⁶⁴ *Local Competition First Report and Order*, 11 FCC Rcd. at 14697, ¶ 392.

²⁶⁵ *Id.*, 11 FCC Rcd. at 14697, ¶ 394 (citing MCI Comments in CC Docket No. 96-98).

²⁶⁶ *UNE Remand Order*, 15 FCC Rcd. at 3803, ¶ 238.

²⁶⁷ *Id.*, 15 FCC Rcd. at 3803, ¶ 239.

²⁶⁸ The Commission has never found, nor has it acknowledged receiving evidence, that NIDs are available from third parties. *See UNE Remand Order*, 15 FCC Rcd. at 3803-3804, ¶¶ 238-240; *Local Competition First Report and Order*, 11 FCC Rcd. at 15697-15699, ¶¶ 392-396.

²⁶⁹ The Commission has never deemed transport to be a proprietary element. *UNE Remand Order*, 15 FCC Rcd. at 3846, ¶ 331; *Local Competition First Report and Order*, 11 FCC Rcd. at 14720, ¶ 446. Therefore, transport must remain on the UNE list if it meets the “impair” test, requiring a finding that a requesting carrier would be “materially diminishe[d]” if unable to obtain transport on an unbundled basis. *UNE Remand Order*, 15 FCC Rcd. at 3725, ¶ 51.

Commission has consistently found that carriers are impaired without access to dedicated transport,²⁷¹ and that conclusion holds equally true today, if not more so than it did just two years ago.

Dedicated transport UNEs carry vast amounts of traffic between CLEC points of presence (“POPs”) and give them entrance to ILEC wire centers to create an efficient, dense and seamless network.²⁷² They include transport between: (1) ILEC central offices and CLEC POPs; (2) ILEC wire centers and IXC POPs; and (3) ILEC end offices or tandems and CLEC POPs.²⁷³ In addition, dedicated transport includes (and is practically limited to) so-called “high-capacity” facilities capable of transmission speeds from DS-1 to OC-192 levels, including SONET rings (to the extent they are already in place). Whether in use or existing as dark fiber, these facilities all fit the definition of the dedicated transport UNE.²⁷⁴

In the *UNE Remand Order*, the Commission held that ILECs must unbundle all forms of dedicated transport until alternative facilities are available “as a practical, economic and operational matter.”²⁷⁵ The Commission also found that without ILEC dedicated transport, carriers cannot accrue “ubiquitous transmission facilities”²⁷⁶ that are required to provide robust and competitive service offerings. Although the Commission acknowledged that some CLECs “have deployed interoffice transport facilities along selected point-to-point routes,” the

²⁷⁰ *NPRM*, ¶ 61.

²⁷¹ *UNE Remand Order*, 15 FCC Rcd. at 3846, ¶ 333; *Local Competition First Report and Order*, 11 FCC Rcd. at 14718, ¶ 440.

²⁷² *UNE Remand Order*, 15 FCC Rcd. at 3842, ¶ 322; *Local Competition First Report and Order*, 11 FCC Rcd. at 14714, ¶ 428, 14718, ¶ 440.

²⁷³ *Local Competition First Report and Order*, 11 FCC Rcd. at 14718 ¶ 440.

²⁷⁴ Dark fiber is “already installed and easily called into service,” and is therefore similar to “lit” transport in all material respects. *UNE Remand Order*, 15 FCC Rcd. at 3843, ¶ 325.

²⁷⁵ *UNE Remand Order*, 15 FCC Rcd. at 3846, ¶ 333.

²⁷⁶ *Id.*

Commission determined that such deployment is not sufficient “such that a requesting carrier’s ability to provide the services it seeks to offer would not be impaired” without unbundled dedicated transport.²⁷⁷

In this review, the Commission has proposed to conduct a “more granular” analysis with respect to the unbundling of transport and other UNEs.²⁷⁸ Of the Commission’s several proposals in this regard, only one stands out as having the potential for implementation in a manner consistent with the unbundling mandate established in Section 251(d)(2). That is, the proposed unbundling analysis by geographic area. As the CLEC Coalition has explained in Section III.A. above, it stands to reason that competition may develop more rapidly in certain areas and to a degree that alternative transport facilities is ubiquitous and comparable to ILEC transport. However, that time has not yet come – in any market. And as also explained above, the type of micro-analysis required to effectuate an area-specific (or route specific) unbundling analysis should involve significant input by the state commissions prior to the Commission’s amendment of its transport unbundling rules.

If the Commission conducts an impair analysis that incorporates a geographic approach, the CLEC Coalition urges it to ensure that the data on which it relies is relevant, complete, detailed and accurate. Generalizations such as CLECs serve “at least 175,000 commercial office buildings, or approximately 25 percent of all commercial buildings nationwide,” a claim proffered by the BOCs in support of their petition last year,²⁷⁹ are so vague and unsubstantiated that they cannot support any Commission conclusion as to CLEC impairment with respect to

²⁷⁷ *Id.*

²⁷⁸ *See NPRM*, ¶ 62.

²⁷⁹ CC Docket No. 96-98, Joint BOC Petition at 11.

dedicated transport UNEs.²⁸⁰ Rather, relevant market- or route-specific, quantifiable, and verifiable data is required for this purpose. To make a decision based on something less would be arbitrary and capricious.

As discussed above in Section II.A above, service-specific considerations, however, are in every case an inappropriate tool for choosing which elements to unbundle. Congress made clear and the Commission has recognized that the services a carrier may provide over a UNE cannot be used to define the facility deployed or the usefulness of the functionality requested; the 1996 Act requires unbundling in a manner 'purposefully agnostic' as to the services provided via UNEs.²⁸¹ Section 251 is deliberately broad in supporting the CLEC "in the services that it seeks to offer,"²⁸² and the Commission has previously relied on that broad language to reject ILEC attempts to define UNEs according to the services that it may or could carry.²⁸³

Nor are capacity-specific helpful at this time for analyzing the availability of transport UNEs. Although, as we recognize in Section II.B above, it is conceivable that certain levels of transport capacity may become more widely available from non-ILEC sources than others, there is no evidence that this currently is taking place in the market and it would be premature to judge

²⁸⁰ AT&T made short order of the BOCs' "data" by demonstrating that it was "based on numerous faulty assumptions and methodological flaws that render it unreliable." Opposition of AT&T Corp. to Joint Petition, CC Docket No. 96-98, at 10 (June 11, 2001) (citing AT&T Crandall Response at 8-29). AT&T further showed, among other things, that "the calculation of CLEC special access 'market share' is grossly overstated," that "the number of competitive LEC 'on-net' buildings is grossly overstated," and that "the number of competitive LECs collocations provide no meaningful data relevant to the impairment analysis." *Id.* at 8.

²⁸¹ See Section III.A, *supra* at 54 (citing 47 U.S.C. § 251(d)(2)(B)).

²⁸² 47 U.S.C. § 251(d)(2)(B).

²⁸³ "The Commission has not previously found that the requirements of section 251(c)(3) are limited to any particular kind of service." *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 177 (citing *Local Competition First Report and Order*, 11 FCC Rcd. at 14679-14683, ¶¶ 356-365).

or predict such marketplace development at this time.²⁸⁴ Transport presently comes in several types and capacities, none of which are more easily obtained from non-ILEC sources than another.²⁸⁵ For this reason, the Commission should not provide ILECs with capacity-specific exemptions from dedicated transport unbundling requirements.²⁸⁶ High capacity facilities remain within the definition of the dedicated transport UNE and must be available to CLECs under the “impair” test, in all levels and forms, including DS1, DS3, OCn, SONET and dark fiber.

This conclusion is inevitable, as the assessment of “changed circumstances” that have developed over the past two years leads to the same conclusion reached by the Commission in the *UNE Remand Order*: CLECs must continue to rely on ILEC unbundled transport to reach many service areas and obtain the ubiquity and scale that Congress and the Commission intended.²⁸⁷ As several members of the CLEC Coalition explained less than a year ago, “it remains the case that, for ubiquitous coverage, ILEC UNEs represent the only option.”²⁸⁸ Coalition members’ current affidavits confirm that this remains the case today.²⁸⁹ Moreover,

²⁸⁴ See *UNE Remand Order*, 15 FCC Rcd. at 3731, ¶ 66. (“[W]e do not base our decision on cost models or on the theoretical availability of alternatives from other sources. Rather, we find the marketplace to be the most persuasive evidence of the actual availability of alternatives as a practical, economic, and operational matter.”); see also, *id.* at 3727-3728 n.103 (“The unbundling standard that we adopt does not allow for the incumbent’s unbundling obligations to be eliminated based merely upon a showing that a requesting carrier has the potential to self-provision or acquire facilities at some indefinite time in the future. This would be inconsistent, as ALTS suggests, with the Act’s goal to encourage for all consumers rapid deployment of competitive alternatives. The unbundling analysis that we undertake considers instead the current facts in the marketplace.”).

²⁸⁵ For example, NuVox has difficulties in obtaining satisfactory third-party DS1 facilities as well as DS3 facilities. *Cadieaux Aff.*, ¶¶ 10-12 (NuVox).

²⁸⁶ See *NPRM*, ¶ 63. See also subsection (1), *infra*.

²⁸⁷ See *UNE Remand Order*, 15 FCC Rcd. at 3744, ¶ 98; *Local Competition First Report and Order*, 11 FCC Rcd. at 14618 ¶ 231.

²⁸⁸ CLEC Coalition High-Cap Loop Comments at 33.

²⁸⁹ *Polito Aff.*, ¶ 8 (SNIPLINK) (“We have not been able to obtain the ubiquitous network build-out that we require in our markets without ILEC transport.”); *Cadieaux Aff.*, ¶ 10-11 (third-party providers of DS1 and

... Continued

dedicated transport UNEs remain “necessary to deliver advanced services and broadband applications,”²⁹⁰ one of the primary focuses of the Commission in the current review. Without ILEC transport, therefore, CLECs cannot achieve a dense and robust network to support broadband and other services they seek to provide to consumers.²⁹¹

In the *UNE Remand Order*, the Commission held that self-provisioning is not “an adequate alternative to the ubiquitous transmission facilities that a competitor can obtain from the [ILEC].”²⁹² This conclusion remains valid today, as in light of the current capital crunch, CLECs are generally less able to rely on self-supply of non-ILEC transport UNE alternatives than they were two years ago. KMC, for example, had to reduce its capital expenditure budget in 2001 and must make substantial reductions again in 2002.²⁹³ Significant impediments to reliance on CLEC self-supply of transport were demonstrated just last summer in the opposition to the Joint BOC petition to remove high-capacity facilities from unbundling obligations.²⁹⁴ For example, the CLEC Coalition explained that self-provisioning transport is made exceedingly difficult by several factors: (1) “the capital crunch which the CLEC industry faces”; (2) “CLECs cannot command the same discounts as ILECs do from their vendors”; and (3) “CLEC costs associated with municipal franchises/permits/rights-of-way typically far outstrip those imposed on ILECs.”²⁹⁵ And even KMC, which has deployed over 2,100 route miles of fiber in 35

DS3 facilities “do not provide anything approaching the geographic ubiquitous coverage that NuVox requires to service small and medium-sized businesses”); Powell Aff., ¶ 5 (e.spire) (“It is because we lack the ubiquity of the Bell network that e.spire must purchase network elements from the Bell companies.”).

²⁹⁰ *Id.* at 3.

²⁹¹ *See id.* at 33.

²⁹² *UNE Remand Order*, 15 FCC Rcd. at 3846, ¶ 332.

²⁹³ Duke Aff., ¶ 4.

²⁹⁴ CLEC Coalition High-Cap Loop Comments at 31-36; Covad High-Cap Loop Comments at 9-14.

²⁹⁵ CLEC Coalition High-Cap Loop Comments at 34.